Supreme Court, U.S.
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No. 97-136

In The

Supreme Court of the United States

October Term, 1996

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,

Petitioners,

vs.

NADINA (MARAVILLA) GUSTILO Individually, and as Former Administratrix of The Estate of ARMANDO C. GUSTILO, Deceased, and as Guardian of JUNE SALVACION (MARAVILLA) GUSTILO; JOSEPH S. HORRIGAN as Guardian Ad Litem and Attorney Ad Litem of JUNE SALVACION GUSTILO; and the Kanaly Trust Company as Administrator of the Estate of ARMANDO C. GUSTILO, Deceased,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Fourteenth Judicial District
Of Texas At Houston**

RESPONDENT'S BRIEF IN OPPOSITION

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MISSTATEMENTS BY PETITIONERS

Respondent adopts and incorporates herein the Misstatements pointed out in Respondent, Joseph S. Horrigan's, Attorney Ad Litem for June S. Gustilo, brief in opposition.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now, Nadina Gustilo, individually and as former Administratrix of The Estate of Armando C. Gustilo, Respondent in this cause and respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Fourteenth Court of Appeals (Houston) Texas entered in this case on July 3, 1996. The opinion appears in petitioners' appendix D.

STATEMENT OF THE FACTS

Respondent adopts the factual and procedural history presented by the Fourteenth Court of Appeals (Houston) in its Opinion which is restated below for this Court's convenience.

On December 19, 1986, Armando C. Gustilo (Gustilo) died intestate in Houston, Texas. He left substantial assets in the United States and the Philippines. On June 2, 1987,

Nadina Gustilo (Nadina) filed an application for administration of the Estate in which she claimed to be Gustilo's surviving spouse. On June 17, 1987, the probate court appointed Nadina administratrix of the Estate, and she continued in that capacity until 1991 when she resigned and the Kanaly Trust Company was appointed successor administrator.

Meanwhile, in the Philippines, Gustilo's son Jose Vincente Gustilo, III (Jose), and Gustilo's daughter Mary Joy Anne Gustilo (Mary), moved for letters of administration and asked that Gustilo's brother be appointed administrator. In August of 1987, Mary, through her mother and guardian, Milagros Barco, entered into a "Compromise Agreement" with Nadina by which Mary waived and renounced her right to inherit from Gustilo. In return, Nadina gave Mary cash and property totaling $ 600,586.00. In February of 1988, Jose entered into a similar agreement with Nadina and received cash and property worth $717,703.00. These agreements were brought before a Philippine court for approval and were approved on March 1, 1988.

Several months after entering the agreements with Nadina, Jose and Mary filed motions asking the Philippine court to reconsider its order of March 1, 1988, approving the agreements. These motions alleged the compromise agreements were obtained through fraud and mistake due to alleged fraudulent concealment by Nadina. Jose and Mary claimed Nadina had misrepresented the size and value of the Estate in order to get them to settle for less than they were actually due.

In 1991, while the motions for reconsideration were pending, Jose and Mary filed suit in the Texas probate

court where the administration of the Estate was pending. In that suit they asked: (1) the court to declare Jose and Mary as Gustilo's children and sole heirs; (2) the court to declare that Nadina was not Gustilo's surviving spouse and that her daughter June Salvacion Gustilo (June) was not his child or heir; (3) the court to declare the compromise agreements void based on Nadina's fraudulent concealment; (4) for an accounting of the Estate monies because they suspected Nadina had taken and misused Estate Funds; (5) that Nadina be required to return Estate assets; and (6) for damages based on fraud, breach of fiduciary duty, trust conversion, and "intentional tort" committed by Nadina. Nadina, individually, as former administratrix, and as June's guardian, answered by general denial and affirmatively pled the defenses of compromise and settlement, release, waiver, estoppel, and quasi-estoppel.

While the case was pending in the probate court in Texas, the Philippine trial court denied the motions for reconsideration filed by Jose and Mary. This order was entered April 6, 1992. Jose and Mary appealed. The appellate court held the Philippine trial court committed a "grave abuse" of discretion when it denied the motions for reconsideration and found the March 1, 1988, and the April 6, 1992, orders were "null and void ab initio" and ordered them set aside. The Philippine trial court was ordered to: (1) continue with the proceedings for appointment of an administrator; (2) determine the relationship of Nadina and June to Gustilo; (3) resolve all other pending matters related to the Estate; and, (4) close the administration of the Estate by proper declaration of heirs and distribution.

Nadina filed a motion for reconsideration with the Philippine appellate court. Her motion was denied and she appealed the case to the Philippine supreme court. On January 24, 1994, the supreme court affirmed the decision of the appellate court.

TEXAS PROBATE COURT RULINGS AND JUDGMENT

Before trial, both sides filed partial motions for summary judgment concerning the heirship of Jose, Mary, and June. The trial court granted these motions and entered partial summary judgments declaring that Jose, Mary, and June are the children of Armando C. Gustilo and are, therefore, his heirs. Jose and Mary also filed a motion for partial summary judgment concerning Nadina's relationship to Gustilo. They asked the court to find as a matter of law that Nadina was not Gustilo's surviving spouse, or, alternatively, to make certain findings under Texas Rule of Civil Procedure 166a(e). There is no order in the record granting or denying this motion; however, the trial court did submit the question of whether Nadina was Gustilo's surviving spouse to the jury, therefore, he implicitly denied the motion.

After Jose and Mary rested their case-in-chief, the trial court granted June's motion for an instructed verdict on the cross-action for damages filed by Jose and Mary. The court submitted the remaining issues to the jury. The jury found: (1) Jose and Milagros Barco, as guardian and next friend of Mary, had released any and all claims to the estate; (2) neither Jose nor Milagros were fraudulently

induced to enter settlement agreements with Nadina concerning the estate; (3) Jose and Milagros waived, renounced, and repudiated any claim to the estate; (4) neither Jose nor Milagros were fraudulently induced to waive any claim to the estate; (5) the Compromise Agreements entered into by Jose and Milagros were "fair" contracts; (6) neither Jose nor Milagros were fraudulently induced to enter the Compromise Agreements; (7) both Jose and Milagros were prevented from claiming any further benefits from the Estate based on the doctrine of "quasi-estoppel"; and (8) that Nadina is the surviving spouse of Armando C. Gustilo.

Based on the jury's answers, the partial summary judgments, and the instructed verdict, the probate court entered judgment that: (1) Jose, Mary, and June are the children and heirs of Armando C. Gustilo; (2) Nadina is the surviving spouse of Armando C. Gustilo and entitled to a spouse' share of the estate; and (3) Jose and Mary are not entitled to any further share or interest in the Estate and should take nothing on their claims for damages. Jose and Mary filed the appeal.

JURISDICTION

This Court lacks jurisdiction because: (1) their is no conflict between state court decisions, U.S. CONST. art. IV, 1; (2) petitioner failed to properly raise a substantial federal question in the state court proceedings, 28 U.S.C., sec. 1257; (3) the judgment and opinion is based upon independent and adequate state grounds; and, (4) petitioners waived their right to rely on the Supremacy

Clause and on comity because they failed to raise it in their initial appeal. (Petitioners' Appendix D, pgs. A9-30).

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT BETWEEN STATE COURT DECISIONS.

Petitioners allege that there is a conflict between the Texas state court decision in *Gustilo v. Gustilo* (Petitioners' Appendix D) and the Philippines Court of Appeals decision in *Gustilo v. Agdamag* (Petitioners' Appendix I).

Petitioners filed a motion with the Texas court of appeals asking it to give full recognition of the Supreme Court of the Philippines decisions under section 35 of the Texas Civil Practice and Remedies Code, and upon doing so, to enforce those decisions by setting aside all the jury findings relating to the agreements between Nadina and appellants. (Petitioners' Appendix D, pg. A-24, ftn. 7). As the court stated, "section 35 is based on the full faith and credit clause of the U. S. Constitution. See *Stine v. Koga*, 790 S.W.2d 412, 414 (Tex. App. – Amarillo 1990, writ dism'd by agreement)" *Id*. The **full faith and credit clause of the U.S. Constitution states that full faith and credit shall be given in each state to the judicial proceedings of every other state.** (emphasis added). U.S. CONST. art. IV, 1. Thus, both section 35.001 et seq. of the Texas Civil Practice and Remedies Code and the U.S. CONST. art. IV, 1 apply to court decisions from other states, not other countries. (Petitioners' Appendix D, pg. A-24, ftn. 7).

Accordingly, petitioners are mistaken that a conflict of law exists.

2. NO FEDERAL QUESTION WAS PRESENTED BELOW IN THE PROBATE COURT, APPELLATE COURT OR ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT.

A federal claim cannot be considered by this Court unless it has been either raised in the state court or considered and resolved by the state court. See *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940): *Hill v. California*, 401 U.S. 797, 805 (1971). Furthermore, Rule 14.1 (g) (i) states that the petitioner seeking review of a state court decision in meeting this burden, must specify in the statement of the case " . . . the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised: the method or manner of raising them and the way in which they were passed upon by those courts. . . . " Sup. Ct. R. 14.1(g)(i). This Court has held in the past that a mere reference to the "Constitution of the U.S." (*Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935)), or the "Constitution and laws of the U.S." (*Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1987)), or "due process of law" (*Bowe v. Scott*, 233 U.S. 648, 664-65 (1914)), is insuffient to raise a federal question.

No federal question was timely preserved in the courts below nor resolved by the Texas courts, and thus should not be considered by this court. Petitioners' writ should be denied.

3. THIS COURT HAS NO JURISDICTION BECAUSE THE STATE COURT'S JUDGMENT AND OPINION ARE BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

This Court's jurisdiction fails because the state court's judgment and opinion are based upon an independent and adequate state ground. *Black v. Cutter Laboratories,* 351 U.S. 292, 298 (1956). The Texas court of appeals held that there was both legally and factually sufficient evidence for the jury to have found that Nadina was Gustilo's surviving spouse. (Petitioners' Appendix D, pg. A-15). In footnote 4, of the opinion the court stated "[w]e have reviewed the law from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Petitioners' Appendix D, pg. A-15, ftn. 4).

4. PETITIONERS RELIANCE ON THE SUPREMACY CLAUSE AND ON COMITY IS WAIVED BECAUSE THEY FAILED TO RAISE IT IN THEIR INITIAL APPEAL.

The basic requirement for obtaining certiorari is preserving issues below. Although this Court is not jurisdictionally barred from considering issues that have not been properly preserved, it ***will consider such arguments only in exceptional cases***. *See, e.g., City of Canton v. Harris,* 489 U.S. 378, 384 (1989) (emphasis added). Petitioners have failed to establish that this is an exceptional case on this issue.

Additionally, petitioners ignored the long standing rule that any point of error not included in an application for writ of error filed in the Supreme Court of Texas is, likewise, waived. *See, e.g., McCauley v. Consolidated Underwriters*, 304 S.W.2d 265 (Tex. 1957); *State Farm Mutual Automobile Insurance Association v. Cowley*, 468 S.W.2d 353 (Tex. 1971).

Petitioners have clearly waived the right to raise comity as an issue before this Court. There was absolutely no mention of the doctrine of comity in petitioners' initial appeal to the Texas court of appeals. Points of error not separately briefed are waived. *LaSara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex. 1984).

The Texas courts have continued to uniformly hold that comity is not a matter of right but is voluntary and vests in the sound discretion of the tribunal of the forum. *Norwell v. Norwell*, 408 S.W.2d 550, error dism'd, cert. denied, 88 S.Ct. 53, 389 U.S. 847, 19 L. Ed. 2d 116; *Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App. – Houston [1st Dist] 1985, error ref'd n.r.e.); *Gunter v. Glasgow*, 608 S.W.2d 273 (Tex. Civ App. – Eastland 1980, no writ). Petitioners did not preseve the issue of comity nor did they preseve that any court below abused their discretion. In fact, they have never raised any claim of abuse of discretion.

Furthermore, the Texas court of appeals demonstrated why comity should not apply in this case. The court "in dicta" stated as follows:

> "Initially, appellants [petitioners] lost their argument concerning the compromise agreements in the Philippine court. While that case

> was under reconsideration in the Phillippines, they filed suit in Houston essentially making the same claim: The compromise agreements were void because of the fraudulent actions of Nadina. When they learned their argument had been accepted by the Philippine appellate court, they attempted to use that decision as a bar in the Houston court. Now, unhappy with the outcome of their case in Houston, they want to rely on the Philippine court's decision. Appellants had the option of not filing suit in Houston, or filing for stay under section 36.007 of the Texas Civil Practice and Remedies Code. They chose neither avenue and cannot now complain because they did not prevail in Texas." (Petitioners' Appendix D, pg. A-23, ftn. 6).

5. THERE IS NO FEDERAL QUESTION PRESENTED OR PRESERVED ON RESPONDENT'S MARRIAGE TO GUSTILO.

Petitioners allege in their petition before this Court that federal questions and concerns of the sovereign laws and policies of the United States and customary laws of the nations were breached by the courts failure to correctly apply Philippine law.

The Texas court of appeals clearly and succinctly reviewed the evidence concerning the issue of whether Respondent, Nadina Gustilo, was Armando Gustilo's surviving spouse. The court found there was evidence both legally and factually sufficient for the jury to find that Nadina was Gustilo's surviving spouse.

Petitioners alleged to the Texas court of appeals that the statements made by or atttributed to Nadina were

judicial admisssions. Petitioners introduced two exhibits: "(1) a petition filed by Nadina in the Philippines to correct June's birth certificate; and (2) facts stated by the Philippine court in its decision declaring the compromise agreement null and void", to show Nadina's first marriage to Maravilla was still valid at the time she married Gustilo. Petitioners argued that these documents were judical admissions. (Petitioners' Appendix D, pg. A-13).

The court throughly analyzed each piece of evidence, and correctly established why they were not judidical admissions. (Petitioners' Appendix D, pgs. A-14,15). The court reasoned that the New Jersey marriage license, which admitted she had been married to Maravilla, but also indicated that it had been "annulled" along with other evidence presented established "a prima facie case of Nadina's marriage to Gustilo and some evidence that Nadina's first marriage was annulled before she married Gustilo in 1982." (Petitioners' Appendix D, pgs. A-12,13). The court further pointed out that some of the documents which petitioners contend contained the alleged judicial admissions "were not introduced into evidence, despite repeated invitations from the trial court." (Petitioners' Appendix D, pg. 10). Furthermore, the court stated "[a]ppellants provide argument on conflict of law and the appropriate law to be applied in determining whether Nadina was Gustilo's surviving spouse. We have reviewed the law from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Petitioners' Appendix D, pg. A-15, ftn. 4). Accordingly, petitioners are mistaken that all aspects of the laws of Texas,

New Jersey and Philippine law were not considered. (Petitioners' Appendix D, pg. A-15, ftn. 4).

No federal question exists or was preseved on the grounds of the Supremacy Clause or comity. Accordingly, petitioners writ should in all respects be denied.

CONCLUSION

Respondent Nadina Gustilo respectfully submits that this Court has no jursidiction in this matter because their is no conflict of laws and no substanitial federal question is involved. Respondent moves for a dismissal on this basis, or in the alternative requests this Court to deny petitioners writ for certiorari.

Respectfully Submitted,

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